No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT et al.,

Appellees,

and

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD et al.,

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CRITICISM OF REPLY BRIEF OF APPELLANT RAUER.

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(1) The reply brief of appellant Rauer opens with certain quotations from the report of the Master which are there stated to be "in effect the final judgment from which the appeal has been taken". These quotations are used to support the theory that Rauer dealt with the Sunset Construction Company in good faith believing it to be a

bona fide corporation. That question was not before the Master for determination as it had already been tried and decided by Judge Van Fleet at the trial of the case in chief. This fact is recognized by the Master and stated by him in terms to be the rule governing him in the hearing of evidence upon Rauer's account. (Trans. 61.) But the Master found many things in Rauer's account which go to show that the account was false and fraudulent and unworthy of credit, and that Rauer was not acting in good faith in rendering the same. We quote from the Master's report:

> "Neither the Sunset Construction Company nor the defendant Rauer kept adequate books of account. The witness Rauer did not confine himself to clear answers to questions but volunteered much that was not pertinent thus destroying the orderly presentation of the facts. The statements filed are confused, misarranged and not at all complete." (Trans. 22.)
>
> "Furthermore both of the statements of account are vitiated by extensive omissions." (Trans. 24.)
>
> "Furthermore the account, though professing on its face to be supported by numbered vouchers, was not so supported. The testimony in regard to it was confused, uncertain and lacking as regards many items and there was much omitted that should have been included." (Trans. 64.)
>
> "The funds have been so mixed by him (Rauer) and there are so many items of doubt, and so much in the evidence to show that more of the prior assets of the Company have been received by Rauer than can be here traced." etc. (Trans. 39.)

Moreover the Master shows that Rauer's claim against the Sunset Construction Company as originally made was $39,318.18 (Trans. 24) while the amount finally fixed by the Master was $18,746.22, (Trans. 78) and to this holding of the Master Rauer takes no exception.

Accordingly we take it as fairly well established by the evidence that great doubt exists as to whether Rauer really has any claim whatever against either Buckman or his alias, the Sunset Construction Company. The original draft report of the Master found that he had none. But the Master, as a prudent and conservative man, finally resolved all doubts in favor of Rauer and allowed him everything that was not clearly proven to belong to the estate in bankruptcy. So far did he go in this respect that Judge Van Fleet in reviewing his report said,

> "The Master, I think, if he committed any error committed it against the parties prevailing as to the extent of the accounting required." (Trans. 202.)

But Rauer's policy of equivocation, and, in many instances, deliberate falsification,—the failure of both parties to keep proper books of account, or to render a proper account before the Master or vouchers in support thereof,—and their ingenious scheme of "exchanging checks" and taking duplicate evidences of indebtedness,—made it humanly impossible to get at the truth through the examina-

tion of hostile witnesses. Practically every witness in the case was hostile, and most of them were defendants. It does not follow, then, that there is any *admitted* debt due to Rauer. We merely suffered through the difficulties of proof to the extent that the Master hesitated, and finally concluded not to reduce his claim more than $20,000.

(2) On the day when this case was called for argument before the Circuit Court of Appeals an affidavit was filed in behalf of Rauer showing that defendant Meadows had died some three years theretofore and it was stated orally, that counsel for plaintiff had never been informed of that fact. No suggestion of this point was ever made to the lower Court, no assignment of error is predicated upon it, and no mention of it is made in the opening brief of appellant. Yet in his reply brief (pg. 13) Rauer contends that this fact voids the so-called "interlocutory decree" against Meadows. That judgment decrees that the stock of the Sunset Construction Company which Meadows claimed to own was in reality the property of Buckman and passed to Buckman's estate in bankruptcy.

The so-called "interlocutory" decree (which was rendered in the lifetime of Meadows), vested title to these shares of stock as well as all assets of the company in Buckman's trustee in bankruptcy (Trans. 15), but no accounting was ordered in respect to said stock as nothing further remained to be done save to deliver them in accordance with the terms of that decree. The accounting was in

terms confined to the defendants other than Meadows, and the Master's report shows that Meadows did not appear before him either as an accounting party or otherwise. (Trans. 19-20.) So far as these shares of stock were concerned, the final nature of the so-called "interlocutory" decree is not open to question. The "final" decree does not refer directly or indirectly to these shares of stock and makes no mention of them. The accounting ordered was in respect of *other property* and *other parties.*

Rauer now claims that the death of Meadows, subsequent to the time when the "interlocutory" decree was made voids the judgment against Meadows because Meadows had no right to appeal therefrom. In the same breath, counsel contend that Meadows' right to appeal was confined to the so-called "final" decree *which didn't even mention these shares,*—these same shares being the only property in which Meadows had any interest. We believe that this contention shows the weakness of Rauer's position. On all principles of logic and common sense the right of Meadows to appeal should be confined to that decree which finally disposed of the property to which he claimed title,—not to the decree which ignored the very existence of that property.

(3) Rauer asserts that all his transactions were with the corporation, Sunset Construction Company, and that his books agreed with those of that concern and that the balance was clearly shown beyond dis-

pute on both sets of books. This is glaringly contrary to the evidence. Rauer dealt with Buckman, the individual, in all cases and finally took Buckman's personal and *individual* note for $20,000 to cover the alleged corporate indebtedness. The Master's report and the argument in our first brief, pages 12-13, establish the fact that Rauer swelled his account with charges that were stricken therefrom as unwarranted and void; that these charges amounted to approximately $20,000 (which tallies with the amount of the Buckman note, a *duplicate* evidence of indebtedness), and that Rauer's own statements under oath as to the amount of the balance due him from the Sunset Construction Company were inconsistent and thoroughly unreliable, if not worse. (Trans. 284.) Rauer rendered no explanation of these inconsistencies although he was called upon to do so, and they go far to indicate that his claim, as asserted in his accounts filed with the Master, was a false and fraudulent claim to the extent of more than $20,000. The account claimed a balance due Rauer as of date of bankruptcy of $39,318.18 and the Master finds the true amount then due to be $18,746.22. This finding of the Master *is not challenged by Rauer.*

The attempted explanation of Rauer as to the reason why he omitted to include in his account payments of upwards of $23,000 made to him by checks from the Sunset Construction Company, seems to us to be well nigh childish. He says he ceased to keep books! (Reply Brief 18.) So he

didn't enter these $23,000 payments on the books (which the evidence showed were actually kept during this period Trans. 286-294), but merely "exchanged checks" with the Sunset. It occurs to us that if a professional usurer (and Rauer is one under the definition of the California statute, Trans. 32-33), desired to cover up his dealings with a client, and destroy evidence of the condition of his accounts, no scheme could be better convinced to accomplish that end than to "exchange checks" instead of making book entries of the transactions, and then to take duplicate evidences of the same indebtedness. Rauer did both these things and we reassert our claim that they show that the motive back of these methods was sinister and corrupt.

(4) It is stated by Rauer (Reply Brief 17) that he collected interest upon only one indebtedness. But the payments represented by these checks for over $23,000 above referred to (and which were omitted from his account), included interest payments of $6619. (Trans. 295.) None of these interest payments were credited either in Rauer's accounts, in his books, or on the back of the promissory notes which he held. He testified,

> "I did not collect $400 a month interest on the $20,000 note. I never got a ten cent piece interest on that note." (Trans. 273.)

This testimony is false and its falsity is established by the stipulation of Rauer's own counsel. (Trans. p. 295.)

(5) Rauer asserts that the only creditors of Buckman were such as had claims against him arising prior to the formation of either Sunset Construction Company. There is not one word in this record which supports that assertion and, as the original Sunset was incorporated in December, 1911, and the bankruptcy was in February, 1915, the contrary would be inferred. Nor does the record show that the Brown judgment was for breach of promise. Even if it were, neither Buckman nor Rauer had a right to defeat its collection by the fraudulent manipulation of Buckman's assets, and counsel must be hard pressed indeed to attempt to prejudice this Court against the many creditors of Buckman by wholly unwarranted innuendos against one of them.

(6) In Rauer's account his dealings respecting the Academy of Sciences contract appear as a single entire transaction (Trans. 270), upon which he collected $300 and expended $588.85. The only testimony in respect to this matter was given by Filmore Buckman who stated that this $300 was an old balance due from the pre-bankruptcy period and that the expenditures were for extra work done after bankruptcy for a percentage over costs. The very bill for the extra work appears on page 373 of the transcript and is for $535 plus 10%, or $53.50, making a total of $588.50. This extra work, the witness says was done after bankruptcy and had nothing to do with the original contract. Thus Rauer's attempt to use it as a charge to cover up

the collection which he made of the Sunset's account is exhibited as an obvious fraud.

(7) Rauer claims (Reply Br. 24) that we 'confess' that the Reeder and Foster account was assigned *before* bankruptcy. Rauer's contention is that it did not arise until *after* bankruptcy. (Opening Br. 70.) He bases this contention upon the claim that the transcript contains a clerical error when it states (Trans. 335) that the account arose in *January, 1915.* In order to meet the claim that there was a clerical error in the transcript we quoted from a brief filed by Rauer before the Master wherein he contended that there was an assignment of this account in *January, 1915.* That purported assignment, for good and sufficient reasons, is not included in the record before this Court, and is only relevant as showing that counsels' claim that there is a 'clerical error' in the present transcript is at absolute variance with the claim which he made in the lower Court. Such changes of position require explanation.

(8) If the sale in bankruptcy of the property covered by the chattel mortgage was made for the reasons alleged on pages 25-26 of Rauer's reply brief, it is difficult to understand why the sale in bankruptcy was made, *not to Rauer,* but to his dummy, (Trans. 281) and not for $7500, the price secured at the original sale, but for $3750. (Trans. 367.) At the time of the bankruptcy sale Rauer cancelled on his ledger the credit for $7500 which he had previously given to the Sunset Construction

Co. (Trans. 294) and states the reason as "Sale of personal property set aside." So the resale of this property in bankruptcy was admittedly because the prior sale by the Superior Court was void and of no effect. Rauer admitted as much when he petitioned the bankruptcy Court for a resale of the property, and his admission by conduct is stronger than any verbal admission that he could possibly make.

(9) The Reply Brief, under the heading "Chattel Mortgage" flatly disputes the statements made by us as to Rauer's dealings with the property covered by that mortgage. It is claimed, first, that the possession of that property, taken by Rauer, was not merely colorable. This because the option dated August, 1916 (Trans. 370), included three sand machines only, and did not mention the rest of the chattels. But if we turn to pages 333 and 334 of the transcript we find a statement of account between Rauer and Buckman which covers not only the sand machines but "track and cars" as well. This constituted practically all the valuable portion of the equipment. (Trans. 341.) In the statement Buckman is charged with certain sums representing the purchase price of the equipment and is *credited with the rentals and profits earned* by the equipment. This statement commences as of date May 1, 1916, *before* the time when Rauer filed his action to foreclose the mortgage, but *after* bankruptcy. So Rauer's possession at that time is disclosed to be colorable to the last degree. The whole situation

indicates that a plan was deliberately conceived by Buckman and Rauer as a result of which the creditors of Buckman in bankruptcy would be deprived of the revenues received from the use of these chattels, while Buckman himself would be credited with every cent earned thereby. Rauer claims he had a right during that period to credit these rents and profits upon his mortgage debt. But *he did not do so.* He credited them to Buckman, personally.

Rauer claims that he took possession of this equipment in March, 1915, and points to certain of his own testimony in the transcript which, as it there appears, will bear such a construction. But when in July, 1916, Rauer secured a collusive decree of foreclosure from the Superior Court he made that decree recite that he had taken possession of these chattels on the day before the decree was rendered. (Trans. 45.)

> "The certified copy of the decree entered by consent on the day after the filing of the complaint recites * * * the delivery of the property, under mortgage to the plaintiff, in the interval between the filing of the suit and the decree on the following day."

The testimony of McCoy, for ten years Buckman's superintendent of equipment, shows the use of this property upon the various jobs in controversy, and indicates that it was used under the direction of Buckman, who was McCoy's employer. (Trans. 339.)

This decree was rendered while the present action was pending and, immediately thereafter, Rauer executes a new option to Buckman covering the purchase of the sand machine. (Trans. 370.) When judgment in the present action was rendered by Judge Van Fleet, Rauer abandoned all claim to title to the mortgaged chattels and sought the permission of the bankruptcy Court to sell them in bankruptcy. They were sold, accordingly, in December, 1916, to Rauer's dummy, and then, for the first time his title was established. Yet as early as May, 1916, he had attempted to exercise dominion over the chattels by selling them to Buckman personally, and crediting him personally with their rents and profits. Is it any wonder that the Master decreed that these rents and profits should go to the estate in bankruptcy? The Master was clearly right, as otherwise he would have countenanced a flagrantly illegal transaction.

(10) There is another very significant fact which is developed from the history of the chattel mortgage. The appellant has printed in the transcript a document which they call "Explanation of the account of J. J. Rauer." (Trans. 85.) In this explanation they refer (Trans. 89-90-91) to the balance of the account which was stated between Rauer and Buckman in March, 1915 (immediately after bankruptcy), and which was in the sum of $28,874.82. They claim that this represented the whole balance due to Rauer from the re-organized Sunset Construction Co. with the exception of $4652.70 which was

omitted by inadvertence, and that the full balance then due was $33,527.52. They claim that this full balance was secured by the chattel mortgage and that the account was stated for the purpose of laying a foundation for a foreclosure thereof.

When this foreclosure proceeding was finally brought, a consent decree was rendered therein, and that decree sets out, (1) that the chattel mortgage was given to secure notes aggregating $15,000. (2) that the balance due on the mortgage debt (after crediting the value of the mortgaged chattels and other credits), is $2500. (Trans. 45.)

The apparently inconsistent statements contained in these two documents (the foreclosure decree and Rauer's "Explanation of Account"), can be reconciled upon one theory, and upon one theory only. That is, that the notes for $15,000 represented a balance due Rauer at the time they were given, which was subsequently increased to $33,527.52 by the dealings thereafter had between the parties, and that payments thereafter made reduced this balance to $2500 at the time the foreclosure decree was rendered. Now the balance of $33,527.52 was claimed by Rauer to be due to him on March 15, 1915, immediately after bankruptcy, and the consent decree was rendered in July, 1916. So very large payments must have been received by him and credited upon this indebtedness between those dates. Excluding the value of the chattels ($7500) as fixed by the consent decree, the amount of those payments would be

$23,527.52. Yet the Master has allowed us only $13,023.19 on this account. We submit that Judge Van Fleet was quite correct when he stated that if any error had been made in this case it was in favor of Rauer.

(11) In his first brief, pg. 70, Rauer claims error in that he is charged with $500 as the amount collected by him from H. Iverson, and $400 from Bosworth.

In the 'Observations upon Master's Report,' prepared and signed by Rauer's attorneys (Trans. 112), it is stated,

> "The Iverson matter Mr. Rauer himself charges against his account in his statement page 6."

And then follows a statement admitting that both these charges are proper ones. Why then do Rauer's attorneys attempt in this Court to dispute the action of the Master in allowing these charges against him?

We submit that after having listened to Rauer's attorneys in the lower Court confess the propriety of charging him with certain sums, we are not to be criticized for failing to insist that the transcript should contain full details in respect to the admitted items. It is characteristic of the defendant Rauer that he should attempt to take advantage of this situation, reversing the attitude which he took below and depending upon the omissions from the transcript to justify his claim of error.

We do not believe that Rauer's methods will commend themselves to the United States Circuit Court of Appeals.

Dated, San Francisco,
December 12, 1923.

Respectfully submitted,

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